IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPEAL NO.553 OF 2006

1. Subhash Hariram Rajbhar
   R/o. Sabre Chawl,
   Near Shivshakti Chawl,
   Gandhi Nagar Cutting No.10,
   Kurar, Malad (E), Mumbai.

2. Ghanshyam Hariram Rajbhar
   R/o. Sabre Chawl,
   Gandhi Nagar Cutting No.10,
   Kurar, Malad (E), Mumbai.

3. Ramdular Ramnihar Bhardwaj
   R/o. Sabre Chawl,
   Near Shivshakti Chawl,
   Gandhi Nagar Cutting No.10,
   Kurar, Malad (E), Mumbai.

4. Babulal @ Bablu Satyanarayan Maurya
   R/o. Shivshakti Chawl,
   Cutting No.10, Bhim Nagar,
   Kurar Village, Malad (E),
   Mumbai- 400 097.

5. Dinesh Ramchandra Rajbhar
   R/o. Shivshakti Chawl,
   Cutting No.10, Bhim Nagar,
   Kurar Village, Kurar,
   Malad (E), Mumbai- 400 097. ...Appellants.

V/s.

The State of Maharashtra
(at the instance of Kurar Police Station
vide C.R.NO.137/05) ...Respondents.

Ms. Anjali Patil, advocate for the Appellants.

Ms. M.M.Deshmukh, APP for the Respondent/State.

CORAM: J.H.BHATIA, J.
DATE : 5th June, 2007.

ORAL JUDGMENT:

1. The appellants, who are original accused nos.1 to 5, have preferred this appeal challenging the judgment and order passed by 3rd Ad-hoc Additional Sessions Judge, Bombay in Sessions Case No.791 of 2005, whereby all the appellants were convicted for the offences punishable under Sections 399 and 402 of the I.P.C. They were sentenced to undergo R.I. for 5 years and to pay a fine of Rs.1,000/- each for the offence punishable under Section 399 of the I.P.C. and were sentenced to undergo R.I. for 3 years and to pay a fine of Rs.500/- each for the offence punishable under Section 402 of the I.P.C.

2. Prosecution case in brief is that, on 11-8-2005 at about noon time, P.W.1 Head Constable Sunil Hosalkar, P.W.5 API Jitendra Koli and API Patil got reliable information from a police informer that in one room of Sabre Chawl 4 or 5 persons had assembled with weapons. In view of this information, police decided to raid that place. Accordingly two panch witnesses were called and the police party alongwith the panchas went to the said spot at about 12.45 hours. The police party was divided into two groups. One group stood near the door of the

room and some staff members stood near a window of that room for a few minutes. They heard conversation, which was going on inside the room. As per the F.I.R. lodged by Head Constable Sunil Hosalkar, police heard somebody in the room saying that "Babloo Saman Thik Kiya Kya Nahi, Saman Barabar Hai, Dukan Ki Zhadi Karke Aya Ke Nahi, Jagha Ka Zadi Ho Gaya Hai." After hearing some conversation police party became sure that the persons inside the room had assembled with weapons for committing dacoity. Therefore, police party led by API Koli pushed the door and entered into the room. API Koli pointed his service revolver to those five persons, who were present in the room. After that personal search of all five persons was taken in presence of the panch witnesses. One country made revolver with one live round and 2 separate live rounds were found in possession of accused no.1 Subhash. One Kukri was also found inserted into right side of his pant. Accused no.2 Ghanshyam was found in possession of one kukri. Accused no.3 Ramdular was found in possession of country made revolver with one live round and one separate round in the right pocket of his pant. Accused no.4 Bablu was found in possession of country made revolver with one live round and two more live rounds in right pocket of his pant. Accused no.5 Dinesh was found in possession of country made revolver with one live round in it. All

these weapons were separately wrapped in polythene bags and were seized and sealed under panchanama. Accused persons and the weapons were taken to the Kurar Police Station where F.I.R. was lodged by Head Constable Sunil Hosalkar.

3. According to the prosecution on the next day, accused no.1 Subhash made a statement before the police that he was ready to show the shop where they had kept watch to commit robbery. Accordingly he led the police and the panchas to jewellery shop of one Mahendrakumar Jematraj Jain. His statement was recorded under memorandum and about showing the shop a panchanama was prepared. Police recorded statements of some witnesses from the locality. Material seized in the incident was referred to Chemical Analyser and the Ballistic Expert's report revealed that country made revolvers or shotguns could be used as weapons and cartridges could also be fired from the said shotguns. After investigation charge-sheet was filed by API Koli for the offences punishable under Sections 399 and 402 of the I.P.C., Sections 3 and 4 read with Section 25 of the Arms Act and Section 37(1)(a) read with Section 135 of Bombay Police Act.

4. Charge was framed against all five accused

persons vide Exhibit 2 for the offences punishable under Sections 399 of the I.P.C., under Sections 3 and 4 read with Section 25 of the Arms Act and under Section 37(1)(a) read with Section 135 of Bombay Police Act. Accused persons pleaded not guilty. According to them, accused Subhash, Ghanshyam and Dinesh were residing in the said room for about one year. Accused Bablu was also residing in the said room for about 4 months and accused Ramdular had came to stay in that room on the previous day. They claimed to be innocent. According to them, they have been falsely implicated in this case and no weapons were recovered from them.

5. On behalf of the prosecution, in all 5 witnesses were examined and some documents were also placed on record. After hearing the evidence and arguments on both sides, the 3rd Ad-hoc Additional Sessions Judge convicted all the five accused persons for the offences punishable under Sections 399 and 402 of the I.P.C. and sentenced them as stated above. However, he acquitted them for the charges under the Arms Act and Bombay Police Act.

6. Heard Ms. Anjali Patil for the accused/appellants and Ms. Deshmukh the learned APP for the State. Perused the record and proceedings of the

trial Court.

7. Out of five witnesses examined by the prosecution, P.W.1 Sunil Hosalkar, who is police Head Constable had lodged F.I.R. in this matter. P.W.5 API Koli attached to Kurar Police Station was Detection Officer. Evidence of these two police officers revealed that Head Constable Sunil Hosalkar had got some reliable news from some informer that in one room of Sabre Chawl near Shivshakti Chawl at Gandhi Nagar, Kurla village, five persons had assembled with weapons with intent to commit dacoity. In view of this information the police officers decided to arrange a trap and accordingly two panch witnesses, including P.W.4 Sanjay Borade, were called. They went near the said spot at about 12.30 p.m. As per the evidence of these two police officers and the panch witness, P.W.4 Sanjay Borade, it appears that the police party was divided into two teams. One group was standing near the window of the room and another group was standing near the door of that room. P.W.1 Head Constable Sunil Hosalkar and some other member of the police staff were standing near the window, while P.W.5 API Koli and P.W.4 Sanjay Borade were standing near the door of that room. As per the evidence of Head Constable Sunil Hosalkar, he heard voice from the room "Whether they are ready". He did

not say anything more than that. P.W.4 Sanjay Borade deposed that the police heard low sounds of those persons in the room and after that police and panchas entered into the room and apprehended those persons. P.W.4 Sanjay Borade did not depose that he had heard any conversation of the accused indicating that accused persons had prepared or planned to commit any offence and particularly dacoity. P.W.5 API Koli, however, claims to have heard that "Babloo Saman Thik Kiya Kya Nahi, Saman Barabar Hai, Dukan Ki Zhadi Karke Aya Ke Nahi, Jagha Ka Zadi Ho Gaya Hai." As per the evidence panchas and the police party entered into the room and took the personal search of all the five accused persons and weapons were recovered from each of them as stated in the earlier part of the judgment. Those weapons were duly wrapped, sealed and seized under panchanama Exhibit 18. According to API Koli, he referred those weapons to Chemical Analyser with covering letter Exhibit 22 and received C.A.Reports Exhibits 23 and 24. As per his evidence, accused no.1 Subhash, accused no.3 Ramdular, accused no.4 Dinesh and accused no.5 Bablu were found in possession of country made revolvers and live rounds. Accused no.2 Ghanashyam was found in possession of one kukri. Thus, according to the prosecution in all 4 country made revolvers with live cartridges were recovered. The Ballistic Expert report revealed that

all these country made hand guns were in working order and they were capable of chambering and firing 12 bore shotgun cartridges.

8. P.W.2 Darogalal Shrivastav is the landlord of that room where all these five accused persons were found. According to him he had let out the said room to one Radheshyam, who is brother of accused no.2 Ramesh @ Ghanshyam. His evidence shows that accused no.2 used to reside in that room alongwith his brothers and sister. According to him many persons used to come and stay in the said room and accused no.2 Ghanshyam @ Ramesh used to tell him that they were the persons from his village and they were returning back soon. On the day of incident, he came to know that five or six persons were arrested in the room.

9. P.W.3 Parvati Kaikade was a neighbour. According to her she came to know that some persons were caught by the police in the room of accused Ramesh @ Ghanshyam.

10. Thus the prosecution case is based mainly on the evidence of P.W.1 Head Constable Sunil Hosalkar, P.W. 4 Sanjay Borade and P.W.5 API Koli. As stated above their evidence only goes to prove that four of the

accused persons were armed with fire arms and one accused was having sharp and cutting weapon. They were all found present in the room, where the accused no.2 Ghanshyam used to reside regularly. Evidence of Head Constable Sunil Hosalkar revealed that he had heard " Whether they are ready". It does not indicate anything about preparation or intention to commit dacoity. Words heard by him are materially different from what API Koli claims to have heard. P.W.5 API Koli claims to have heard "Babloo Saman Thik Kiya Kya Nahi, Saman Barabar Hai, Dukan Ki Zhadi Karke Aya Ke Nahi, Jagha Ka Zadi Ho Gaya Hai." It should be noted that API Koli and Sanjay Borade standing together by the side of the door of that room. It is difficult to understand how API Koli could hear said conversation while the panch witness Sanjay Borade could not hear a word. According to him police had heard something in low voice. It means that he could not hear anything or atleast whatever was being talked inside was inaudible. For a moment, even if the evidence of API Koli is believed, this conversation heard by him does not lead to a conclusion or inference that the accused persons had prepared and assembled to commit dacoity.

11. The learned trial Court found a support to this inference against the accused on the basis of some more

evidence of API Koli, which needs to be mentioned. As per the evidence of API Koli, accused no.1 Subhash was ready to make voluntary statement and, therefore, he called two panch witnesses. Accused no.1 Subhash stated that he was ready to show the place where they were about to commit dacoity. This statement was recorded as memorandum Exhibit 20. After that police, panchas and accused no.1 Subhash went to Kandivali (West) Bus Depot. Accused No.1 Subhash pointed out jewellery shop of Mahendrakumar Jematraj Jain as a place where they had planned to commit dacoity. This was recorded under panchanama Exhibit 21. The learned trial Court relied upon this evidence of API Koli for the offences punishable under Section 399 or 402 of the I.P.C. Preparation to commit dacoity and to assemble for that purpose are themselves offences punishable under the law. If the accused states before the police that he and other accused had planned and prepared to commit dacoity at a particular place, that amounts to confession of the offence punishable under Section 399 and 402 of the I.P.C. Under Section 25 of the Evidence Act "No confession made to a police officer, shall be proved as against a person accused of any offence." Under Section 26 of the Evidence Act "No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of

a Magistrate, shall be proved as against such persons." It is not the case of the prosecution that when the accused no.1 Subhash made the confession recorded in the memorandum Exhibit 20 and panchanama Exhibit 21, any Magistrate was present. Therefore, confession made by the accused no.1 Subhash is hit by the provisions of Section 25 and 26 of the Evidence Act and it would be inadmissible in evidence. Section 27 of the Evidence Act is however, an exception or a proviso to Sections 25 and 26 of the Evidence Act. While a confession made before the police or while in police custody is inadmissible under Sections 25 and 26 of the Evidence Act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, **so much of such information,** whether it amounts to a confession or not, **as relates distinctly to the fact thereby discovered, may be proved.** Therefore, only that part of the information, which may be in the nature of confession, is admissible which relates distinctly to the discovery of fact which is admissible under the law. If on the basis of information given by the accused no.1 police would have discovered some fact relevant for this case, that statement would be admissible in evidence under Section 27 of the Evidence Act. However, no recovery of any material was made nor any fact was

discovered as a result of the alleged confession or information given by the accused no.1. Alleged statement made by the accused no.1 before the police and panchas is a confession of the offence simplicitor without leading to any discovery. Therefore, in my considered opinion, the said statement or confession was hit by Sections 25 and 26 and is inadmissible under the law. It could not be admitted in evidence under Section 27 because it did not lead to any discovery nor it was distinctly related to discovery of any fact. It is material to note that prosecution had not examined any panch witness and the learned trial Court placed implicit reliance on API Koli and admitted in evidence the confession, which was inadmissible under the law. Therefore, that part of the evidence has to be ignored while deciding this matter.

12. As far as the conversation of the accused persons inside the room at the time of raid is concerned, there is no witness except API Koli and the conversation heard by him also does not indicate that the accused persons had planned, prepared or assembled to commit any dacoity. If the prosecution evidence is to be believed at the most it is proved that they were found in possession of certain weapons but merely because weapons were in their possession, an inference

can not be drawn that they had planned, prepared and assembled to commit dacoity. In support of this contention, Ms. Anjali Patil placed reliance upon **Mohammad Hussain and etc. v. State of Bihar 1987 Cri.L.J. 1391** and **Chaturi Yadav and others v. State of Bihar AIR 1979 Supreme Court 1412.** In the case of **Mohammad Hussain,** according to the prosecution during the night time 20 persons were found sitting in the orchard in the suspicious condition. On seeing flash of torch by the police party, those persons started running away. After a chase five persons were caught. They were holding some arms. Besides the fact that they were found sitting in suspicious circumstances in the orchard in the night time and they were found with deadly weapons, there was no material to show that they have prepared or assembled to commit dacoity. In view of this, while allowing the appeal against the conviction, Patna High Court observed as follows in paragraph 13:

> "13. In the present case also, the prosecution has miserably failed to prove that the appellants alongwith with other companions had assembled at that lonely orchard for the purpose of committing dacoity and not for any other purpose. There is also no material from which it can be said with any amount of certainty that they had made preparation for committing dacoity. Mere possession of firearms cannot be sufficient to prove that they intended to commit dacoity and not any other offence. In such circumstances, there is no option but to hold that the prosecution has

> failed to prove the charge under S.399 or under S.402 of the Indian Penal Code against the appellants."

13. In **Chaturi Yadav** some accused persons were found to have assembled at lonely place at 1.00 a.m. and could not explain their presence at such odd hours. Evidence led by the prosecution merely showed that 8 persons found in the school premises and some of them were armed with guns and some had cartridges. In view of this fact, the Supreme Court held that mere fact that these persons were found at 1 a.m. did not by itself prove that they had assembled for the purpose of committing dacoity or making a preparation to commit such a dacoity. Their Lordships observed that the possibility that the appellants might have collected for the purpose of murdering somebody or committing some other offence could not be safely eliminated. In such circumstances the Supreme Court allowed the appeal of the accused persons against the conviction and acquitted them for the offences punishable under Sections 399 and 402 of the I.P.C.

14. It is material to note that besides the weapons, no material or property was recovered from the accused on the basis of which it could be held that they had committed any robbery or dacoity prior to this

incident. There was no criminal antecedents of these persons. It appears that after arrest of these persons in the present case, they were also booked in another robbery case but the learned counsel for the accused/appellants makes a statement that after trial they were acquitted in that case also.

15. The above referred two authorities are aptly applicable to the facts of the present case. Merely because accused persons were found present in the residential house of the accused no.2 with certain weapons, it can not be inferred or presumed that they had made preparation or had assembled to commit dacoity. It may be noted that the trial Court had framed charge only for the offence punishable under Section 399 of the I.P.C. and under the Arms Act and Bombay Police Act as stated above. Accused persons were acquitted of the charges under the Arms Act and Bombay Police Act. No charge was framed under Section 402 of the I.P.C. against the accused persons. In spite of this the learned trial Court convicted all the five accused persons not only for the offences punishable under Section 399 but also under Section 402 of the I.P.C., which shows lack of application of mind to the facts of the case. Any how, taking into consideration the facts and the evidence on record, the impugned judgment and

order of conviction and sentence can not be sustained. The accused are entitled to be acquitted of the charges under Sections 399 and 402 of the I.P.C.

16. Appeal is allowed. The impugned judgment and order convicting the accused/appellants are hereby set aside. Accused persons are acquitted of the charges under Sections 399 and 402 of the I.P.C. They be set at liberty forthwith if not required in any other case.

(J.H.Bhatia,J.)